

**Statement of
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**Before the
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives**

**Concerning the
The Voting Rights Act: Evidence of Continued Need
March 8, 2006**

Introductory Statement

Chairman Chabot, Ranking Member Nadler and distinguished members of the Subcommittee. I am pleased to appear before you today to present the key findings of the ACLU's latest report, [The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union](#), which provides significant evidence for the need to reauthorize the Voting Rights Act (VRA). We have also released a policy report, [Promises to Keep: The Impact of the Voting Rights Act in 2006](#), which provides policy recommendations for renewing and restoring the VRA's vitality. While my comments will focus primarily on our litigation report, I would like to request that both reports, as well as my written statement, be formally entered into the hearing record.

Forty-one years ago yesterday, on March 7, 1965, more than 500 civil rights marchers were brutally assaulted by state troopers after crossing the Edmund Pettus Bridge in Selma, Alabama, for peacefully protesting the denial of their right to vote. Speaking of that fateful day, Dr. Martin Luther King, Jr. said that President Johnson's support of the Voting Rights Act had

helped transform the violence in Selma into a “shining moment in the conscience of man.”¹

The VRA has been one of the most effective civil rights laws in eliminating discrimination and granting access to the ballot box for minorities. Presidents Johnson, Nixon, Reagan, Ford, and George H.W. Bush have supported the enactment or reauthorization of key parts of the law. Most recently, President George W. Bush stated that “many active citizens struggled hard to convince Congress to pass civil rights legislation that ensured the rights of all – including the right to vote. That victory was a milestone in the history of civil rights. Congress must act to renew the Voting Rights Act of 1965.”²

The Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. As discussed in our policy report, *Promises to Keep*, these increases in representation translate into vital and tangible benefits such as improved education, healthcare, and economic development for previously underserved communities. Prior to the Act’s passage, many minorities had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected because of the equal voting opportunities afforded minority citizens have been more responsive to the needs of minority communities.

The continuing need for the VRA is best exemplified by the 293 legal cases brought, or participated in, by the Voting Rights Project of the American Civil Liberties Union challenging discrimination in voting and the failure to comply with federal and state election laws in 31 states.

¹ Nick Kotz, JUDGMENT DAYS. LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA (Boston: Houghton Mifflin, 2005), p. 324.

² President George W. Bush, President Celebrates African American History Month at the White House (Feb. 22, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/02/20060222-6.html>).

Because these cases were brought - or continued – after the 1982 Voting Rights Act reauthorization, and because they substantively document the problem of ongoing voting discrimination in the covered jurisdictions, they clearly demonstrate the need for extension of the special provisions that are scheduled to expire in 2007: (1) Section 5 preclearance and the formula enumerated in Section 4(b) for determining which jurisdictions are subject to Section 5's provisions;³ (2) the minority language assistance provisions of Section 203;⁴ and (3) the federal observer provisions which deter and document intimidation of minority voters.⁵

The Senate Report that accompanied the 1982 extension of Section 5 warned that without the preclearance requirement, "many of the advances of the past decade could be wiped out overnight with new schemes and devices."⁶

The Case for Extending and Amending the Voting Rights Act

Our litigation report discusses the involvement of the ACLU Voting Rights Project in 293 cases brought in 31 states since June 1982, the date of the last extension of the special provisions of the Voting Rights Act.⁷ The states and the number of cases brought were: Alabama (9); Arkansas (2); California (1); Colorado (1); Connecticut (1); Florida (15); Georgia (145); Illinois (1); Kansas (2); Louisiana (4); Maryland (4); Michigan (1); Minnesota (2);

³ 42 U.S.C. § 1973c and 42 U.S.C. § 1973b(b)

⁴ 42 U.S.C. § 1973aa-1a(c)

⁵ 42 U.S.C. § 1973f

⁶ S.Rep. No. 97-417, 97th Cong., 2d Sess. 10(1982).

⁷ The report discusses only those cases initiated, or participated in, by the ACLU Voting Rights Project, and does not include litigation brought independently by ACLU state affiliates, unless specifically noted. This report also discusses non-litigation interventions engaged in by the ACLU to protect the ability of minority voters to elect representatives of choice.

Mississippi (3); Missouri (2); Montana (6); Nebraska (2); New Jersey (1); New Mexico (1); New York (1); North Carolina (17); Ohio (1); Pennsylvania (1); Rhode Island (2); South Carolina (38); South Dakota (6); Tennessee (3); Texas (3); Virginia (15); Washington (2); and Wyoming (1).

I. Discriminatory Voting Changes Have Been Blocked as a Result of Section 5

The Department of Justice has filed more than 1,000 objections under Section 5 since 1982. These objections protected millions of voters in thousands of elections over the past two decades. A few examples from the cases discussed in this report will suffice to illustrate the continuing importance of Section 5.

The City of Albany, Georgia: 2002-2003

Following the 2000 census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that, while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistricting had decreased the black population "in order to forestall the creation of a majority black district." The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."⁸ A subsequent court-ordered plan remedied the vote dilution in Ward 4.⁹ But in the absence of Section 5, elections would have gone forward under a plan with "implicit" purposeful discrimination, which could only have been challenged in time-consuming vote

⁸ J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., September 23, 2002.

⁹ Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

dilution litigation under Section 2, where the minority plaintiffs would have borne the burden of proof and expense.

Charleston County, South Carolina: 2003-2004

In 2003, Charleston County, South Carolina enacted legislation adopting the identical election method for the board of trustees of the school district, which had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.¹⁰ Under the previous system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. The proposed new partisan system would have effectively eliminated that possibility.

In denying preclearance to the county, the Department of Justice concluded "[t]he proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process." The department noted further that:

every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.¹¹

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board.

¹⁰ *United States v. Charleston County and Moultrie v. Charleston County Council*, 316 F. Supp. 2d 268 (D. S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004), *cert. den'd*, 125 S. Ct. 606 (2004).

¹¹ R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

Georgia Redistricting: 1982-1983

A three-judge court in the District of Columbia denied preclearance to Georgia's infamous 1980 congressional redistricting plan finding that it was adopted with "a discriminatory purpose in violation of Section 5."¹² The decision was affirmed by the Supreme Court.¹³ Numerous other Section 5 objections are discussed in detail in the ACLU's report.

II. There Is a Continuing Pattern of Racial Bloc Voting in the Covered Jurisdictions

One of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains an important factor in the political process, particularly in the covered jurisdictions. Racial bloc voting often occurs when members of the same racial group vote the same way to block minority candidates from being elected. The VRA has been instrumental in giving minority communities fair and responsive representation they would not otherwise have. Decades of experience strongly suggest that in racially polarized environments – common in the jurisdictions covered by the Voting Rights Act – minority communities that do not constitute a majority of the voting district can be more easily disregarded by officeholders who are hostile or indifferent to minority concerns.¹⁴ In contrast, when minority communities are given the opportunity to elect candidates of their choice, those elected officials have been and are more

¹² *Busbee v. Smith*, 549 F. Supp. 494, 517 (D. D.C. 1982).

¹³ *Busbee v. Smith*, 549 U.S. 1166 (1983).

¹⁴ See Written Testimony of Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Education Fund, Inc., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15 (Nov. 9, 2005), available at <http://judiciary.house.gov/media/pdfs/shaw110905.pdf>.

likely to be responsive to their constituencies. Indeed, evidence demonstrates that increased black representation has resulted in state legislatures giving greater priority to policy areas found to be important to black elected officials and their constituencies.¹⁵

Racially Polarized Voting in South Carolina: 1984-2004

In 1992, the three-judge court in Burton v. Sheheen relied upon the stipulation of the parties "that since 1984 there is evidence of racially polarized voting in South Carolina."¹⁶ A subsequent three-judge court in Smith v. Beasley, decided in 1996, found that "[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state."¹⁷ In Colleton County Council v. McConnell, decided in 2002, the three-judge court made similar findings: "[v]oting in South Carolina continues to be racially polarized to a very high degree in all regions of the state and in both primary and general elections."¹⁸ In 2004, the court of appeals affirmed the finding of a district court in South Carolina "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines."¹⁹

Racially Polarized Voting in Indian Country: 1986-2004

In invalidating South Dakota's 2000 legislative redistricting plan for diluting Indian voting strength in the area of the Pine Ridge and Rosebud Sioux Indian Reservations, the U.S.

¹⁵ See Chris T. Owens, *Black Substantive Representation in State Legislatures from 1971-1994*, 86 SOCIAL SCI. 779, 780 (Dec. 2005) (documenting increased funding for both healthcare and welfare spending where the percentage of black state legislators examined increased).

¹⁶ Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D. S.C. 1992).

¹⁷ Smith v. Beasley, 946 F. Supp. 1174, 1202 (D.S.C. 1996).

¹⁸ Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).

¹⁹ Moultrie v. Charleston County Council, 365 F.3d 341, 350 (4th Cir. 2004).

District of South Dakota found "'legally significant' white bloc voting."²⁰ The court struck down at-large elections in Blaine County, Montana, finding that racially polarized voting "made it impossible for an American Indian to succeed in an at-large election."²¹ In invalidating at-large elections in Big Horn County, the court made similar findings that "there is racial bloc voting," and "there is evidence that race is a factor in the minds of voters in making voting decisions."²²

Racially Polarized Voting in Georgia: 2002

The District Court for the District of Columbia, in a Section 5 preclearance action involving Georgia's legislative redistricting plan, found there were areas of the state where "white voters consistently vote against the preferred candidates of African Americans."²³

Racially Polarized Voting in Tennessee: 1993-1994

A three-judge court found that in West Tennessee there is "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice," and that racial polarization is so extreme that "black candidates cannot expect to succeed in majority-white districts."²⁴ Another court found in 1994 that "the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office."²⁵

²⁰ Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1017 (D.S.D. 2004).

²¹ United States v. Blaine County, Montana, 363 F.3d 897, 914 (9th Cir. 2004), cert. den'd, Blaine County v. United States, 125 S. Ct. 1824 (2005).

²² Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1013 D. Mont. 1986).

²³ Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D.D.C. 2002).

²⁴ RWTAAAC v. McWherter, 836 F. Supp. 453, 458, 462 (W.D. Tenn 1993).

²⁵ Cousin v. McWherter, 840 F. Supp. 1210, 1215 (E.D. Tenn. 1994).

III. Continuing Hostility to Minority Political Participation

Aside from patterns of polarized voting, the ACLU report and other evidence shows that the temptation to manipulate the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982, when Congress last reauthorized Section 5. The recent Supreme Court brief filed by the State of Georgia in Georgia v. Ashcroft provides a vivid, present day example of the willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.²⁶

In its brief, the state resurrected the anti-Voting Rights Act rhetoric of prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the lower court, the state argued, Section 5 was "unconstitutional."²⁷ But the arguments the state made about the districts at issue were far more hostile to minority voting rights than even its anti-Voting Rights Act rhetoric.

One of the state's arguments was that the retrogression standard of Section 5 should be abolished in favor of an "equal opportunity" to elect standard, which it defined as "a 50-50 chance of electing a candidate of choice."²⁸ A 50-50 chance to win is also a 50-50 chance to lose. Given the fact that blacks are elected primarily from majority black districts, if the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the majority black districts, the number of blacks elected

²⁶ 539 U.S. 461 (2003).

²⁷ Brief of Appellant State of Georgia, pp. 28, 31, 40-1.

²⁸ *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 66 (D. D.C. 2002).

to the legislature could be reduced by half, or even more. The Supreme Court rejected the state's invitation to rewrite Section 5.

The state argued further that a district provided minority voters an equal opportunity to elect their candidates of choice when it contained only a 44% black voting age population. The adoption of that standard would have permitted the state to abolish all of its previously majority black districts. It would also have turned blacks into second class voters, with bloc voting white majorities controlling most, if not all, of the legislative districts.

Georgia further demonstrated its disregard for minority voting rights in Georgia v. Ashcroft by arguing that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community. The Supreme Court, once again, rejected the state's argument, an argument which can charitably be described as irresponsible.

Restrictive Photo ID Requirements for Voting

More recently, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill that had the dubious distinction of being the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of five specified forms of photo ID. Those without such an ID would have to purchase one for \$25. Not only are there laws on the books that make voter fraud a crime, but there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement. The new requirement would also have an adverse impact upon minorities, the elderly, the disabled, and the poor. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October 18, 2005, the federal court enjoined its use on the

grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause.²⁹

States other than Georgia have also enacted new photo ID requirements for voting, and it has often been in response to the increased participation of a minority group in the electoral process. Following the 2002 elections in South Dakota, for example, which saw a surge in Indian political activity, the legislature passed laws that placed additional requirements for voting, including requiring photo identification at the polls. State Rep. Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said the legislation retaliated against new Indian voters because they were a big factor in a close Senate race. During legislative debate on another bill which would have made it easier for Indians to vote, an opponent of the measure said, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."³⁰

Other Examples

Other examples of discrimination against minority voters discussed in the ACLU litigation report include: discriminatory annexations and deannexations;³¹ challenges by white voters or elected officials to majority minority districts;³² pairing black incumbents in

²⁹ Common Cause/Georgia v. Billups, Civ. No. 4:05-CV-0201-HLM (N.D. Ga.).

³⁰ Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1026 (D.S.D. 2002).

³¹ Adel, Ga., 1982; Ahoskie, N.C., 1989; Augusta, Ga., 1987; Clinton, S.C., 2002; College Park, Ga., 1979; Emporia, Va. 1987; Foley, Ala., 1989 & 1993; Hemingway, S.C., 1994; Laurinburg, N.C., 1994; Macon, Ga., 1987; Rocky Mount, N.C., 1984; Sumter County, S.C., 1985 & 1986.

³² Cocoa, Fla., 1994; Ga., congressional, house, and senate redistricting, 1990; Georgetown County, S.C., 1983; La., congressional redistricting, 1994; Mont., legislative redistricting, 2003; N.C., congressional redistricting, 1991-2001; Perry County, Miss., 1993; Putnam County, Ga., 1997; S.C., house and senate redistricting, 1996; S.C. congressional redistricting, 1996 & 1998; St. Francisville, La., 1995; Telfair County, Ga., 1986; Union County, S.C., 2002; Va., congressional redistricting, 1995; S.D. redistricting, 1996).

redistricting plans;³³ refusing to draw majority minority districts;³⁴ refusing to appoint blacks to public office;³⁵ maintaining a racially exclusive sole commissioner form of county government;³⁶ refusing to designate satellite voter registration sites in the minority community;³⁷ refusing to accept "bundled" mail-in voter registration forms;³⁸ refusing to allow registration at county offices;³⁹ refusing to comply with Section 5 or Section 5 objections;⁴⁰ transferring duties to an appointed administrator following the election of blacks to office;⁴¹ white opposition to restoring elections to a majority black town;⁴² requiring candidates for office to have a high school diploma or its equivalent;⁴³ prohibiting "for sale" and other yard signs in a predominantly white municipality;⁴⁴ disqualifying black elected officials from holding office or participating in decision making;⁴⁵ relocating polling places distant from the black community;⁴⁶ refusing to hold

³³ West Palm Beach, Fla., 1990.

³⁴ Bossier Parish, La., 1992; Ga., congressional redistricting, 1982.

³⁵ Ben Hill County, Ga., 1988; Johnson County, Ga., 1983.

³⁶ Bleckley County, Ga., 1985; Wheeler County, Ga., 1993.

³⁷ Columbus/Muscogee County, Ga., 1984.

³⁸ Ga., 2004.

³⁹ Fulton County, Ga., 1986.

⁴⁰ Ga., judicial elections, 1989; Charlton County, Ga., 1985; Ga., soil and water conservation elections, 2004; Douglasville, Ga., 1996; Greene County, Ga., 1985; Rochelle, Ga., 1984; La., 1995; S.D. , 1976-2002.

⁴¹ Kingston, Ga., 1987.

⁴² Keysville, Ga., 1990.

⁴³ Clay County, Ga., 1993; Augusta, Ga., 1987.

⁴⁴ Avondale Estates, Ga., 2000.

⁴⁵ Sumter County, Ga., 1998; Thomaston, Ga., 1986; Beaufort County, S.C., 1983).

⁴⁶ Millen, Ga., 1995; Wrightsville, Ga., 1992.

elections following a Section 5 objection;⁴⁷ maintaining an all white self-perpetuating board of education;⁴⁸ challenges to the constitutionality of the NVRA;⁴⁹ failure to provide bilingual ballots and assistance in voting;⁵⁰ county governance by state legislative delegation;⁵¹ challenges to the constitutionality of the Voting Rights Act;⁵² packing minority voters to dilute their influence;⁵³ and using discriminatory punch card voting systems.⁵⁴

IV. The Continued Need for Section 5

Much progress has been made in minority voting rights and office holding in recent times, but it has been made in large measure because of the existence of Section 5 and the other provisions of the Voting Rights Act. One of the principal conclusions of Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, was that the increase in minority office holding was the result of "the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting the black vote."⁵⁵

⁴⁷ Butler, Ga. 1995.

⁴⁸ Thomaston, Ga., 1981.

⁴⁹ La., 1995; Va., 1995; S.C., 1995.

⁵⁰ Michigan, Buena Vista and Clyde Townships, 1992; Bennett County, S.D., 2002.

⁵¹ S.C., 1999 .

⁵² Sumter County, S.C., 1982; Blaine County, Mont., 2005.

⁵³ Buffalo County, S.D., 2003; S.D., legislative redistricting, 2002.

⁵⁴ Ga., 2001; Fla., 2001; Calif., 2001; Ill., 2001; Oh. 2002.

⁵⁵ Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, Chandler Davidson and Bernard Grofman, eds. (Princeton; Princeton University Press, 1994), p. 336.

The fact that Section 5 has been so successful is one of the arguments in favor of its extension in 2007, not its demise.

The persistent, widespread patterns of racial bloc voting found by the courts underscore the need for extension of Section 5, as do the continuing, well documented efforts of elected officials to dilute minority voting strength and deter minority political participation.

That is apparent from the findings of violations of Section 2 of the Voting Rights Act in cases discussed in this report, as well as the decisions of jurisdictions not to contest Section 2 claims and enter into consent decrees. The central role of Section 5 is further apparent from the redistricting that follows each decennial census. As the discussion of redistricting litigation in the ACLU report makes clear, in the absence of Section 5 minority voters would become increasingly marginalized during the redistricting process.

The right to vote is, indeed, "preservative of all rights."⁵⁶ As long as the tradition of racial discrimination in voting continues, the protection of Section 5 remains essential to the health of American democracy.

Section 5 Has an Important Deterrent Effect

Aside from blocking the implementation of discriminatory voting changes, Section 5 has a strong deterrent effect. In 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plan it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford

⁵⁶ Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Bishop and David Scott) that had elected black members of Congress.⁵⁷ There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean, however, that Section 5 did not play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

V. The Courts Routinely Apply the Voting Rights Act

Section 5 continues to play a critical role because it is routinely applied by the federal courts to prevent retrogression and protect the equal right of minority voters to participate in the political process.

South Carolina

The three-judge court in Colleton County Council v. McConnell, the litigation filed after the South Carolina governor and legislature deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.⁵⁸

Mississippi

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans

⁵⁷ HB 499 (2005)

⁵⁸ Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 655-56, 661, 666 (D.S.D. 2002).

relying upon the non-retrogression standard of Section 5 that maintained one of the districts as majority black.⁵⁹

Georgia

A three-judge court in Georgia appointed a special master to prepare court-ordered plans after the state failed to enact remedial plans for the house and senate. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house. Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, participated as amicus curiae. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court-ordered plans should "comply with the racial-fairness mandates of Section 2 of the Act, as well as the purpose-or-effect standards of Section 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. As the court found in adopting the new plan, there was no retrogression from the pre-existing benchmark plans.⁶⁰

Also in Georgia, in implementing a court ordered plan for the City of Albany in 2003, the court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply

⁵⁹ Smith v. Clark, 189 F. Supp. 2d 529, 535, 540 (S.D. Miss. 2002).

⁶⁰ Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D. Ga. 2004).

with Sections 2 and 5 of the Voting Rights Act."⁶¹ Under the court-ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.

South Dakota

The district court in South Dakota adopted a court-ordered plan for the house and senate in 2005 to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota constitution, and federal statutes."⁶² The area in question included Todd and Shannon Counties, both of which are covered by Section 5.

POLICY RECOMMENDATIONS

I. Section 5 of the Voting Rights Act Should Be Extended for 25 Years

Section 5 should be extended for 25 years because there is still strong evidence of discrimination in voting, racially polarized voting, and manipulation of minority voters by covered jurisdictions. Section 5 has also blocked the implementation of numerous discriminatory voting changes, has a strong deterrent effect, and is routinely applied by the courts. Section 5 is still needed to protect the rights of minority voters.

⁶¹ Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228, 1235, 1238 (M.D. Ga. 2003), and Order of December 30, 2003.

⁶² Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005).

II. Section 5 Should Be Clarified to Provide that a Voting Practice Adopted with a Non-Retrogressive but Discriminatory Purpose Should Be Denied Preclearance

The Problem Created by Bossier II

Bossier Parish, Louisiana, adopted a redistricting plan for its 12-member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district. One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."⁶³

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."⁶⁴ The Supreme Court affirmed in a decision known as Bossier II.⁶⁵ It held "in light of our longstanding interpretation of the 'effect' prong of Section 5 in its application to vote dilution claims, the language of Section 5 leads to the conclusion that the 'purpose' prong of Section 5 covers only retrogressive dilution."⁶⁶ Thus, an admittedly discriminatory plan, which was the product of intentional discrimination and had

⁶³ This history is set out in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 324, 348 (2000) ("Bossier II").

⁶⁴ *Reno v. Bossier Parish School Bd.*, 7 F. Supp. 2d 29, 31-2 (D. D.C. 1998).

⁶⁵ In *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997), known as "Bossier I," the Court ruled that a voting practice could not be denied preclearance under Section 5 merely because it violated the results standard of Section 2, that a retrogressive effect was required.

⁶⁶ *Bossier II*, 528 U.S. at 328.

an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5. The majority further held that denying preclearance to a voting change on the grounds that it was enacted with a discriminatory but nonretrogressive purpose "would also exacerbate the substantial' federalism costs that the preclearance procedure already exacts, . . . perhaps to the extent of raising concerns about Section 5's constitutionality."⁶⁷ The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

the full legislative history shows beyond any doubt just what the unqualified text of Section 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.⁶⁸

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."⁶⁹ He explained to one fellow house member, "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it."⁷⁰ Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the

⁶⁷ Id. at 336.

⁶⁸ Id. at 366.

⁶⁹ *Busbee v. Smith*, 549 F. Supp. 494, 501 (D. D.C. 1982).

⁷⁰ Id., Deposition of Bettye Lowe, p. 36.

product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for.

III. Section 5 Should Be Amended to Provide that Voting Practices that Diminish the Ability of Minority Voters to Elect Candidates of Choice Should Be Denied Preclearance

The Decision in Georgia v. Ashcroft

In Georgia v. Ashcroft, the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."⁷¹ Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."⁷² The Supreme Court held that while this factor "is an important one in the Section 5 retrogression inquiry," and "remains an integral feature in any Section 5 analysis," it "cannot be dispositive or exclusive."⁷³ The Court found that the three-judge court should have considered additional factors, including: "whether a new plan adds or subtracts 'influence districts'--where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" and

⁷¹ 539 U.S. 461, 490 (2003).

⁷² Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).

⁷³ *Id.*, 539 U.S. at 480, 484, 486.

whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."⁷⁴

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded "[w]e leave it for the District Court to determine whether Georgia has indeed met its burden of proof."⁷⁵ But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one-person, one-vote grounds,⁷⁶ and implemented a court-ordered plan.⁷⁷ As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."⁷⁸ The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the Section 5 touchstone."⁷⁹

The Problems with Georgia v. Ashcroft

The majority opinion introduced new difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a

⁷⁴ Id. at 482-83.

⁷⁵ Id. at 487, 489.

⁷⁶ *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd* 124 S. Ct. 2806 (2004).

⁷⁷ *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).

⁷⁸ Id. at 494.

⁷⁹ Id. at 495.

standard that focused on the ability to elect candidates of choice, easily understood and applied, and turned it into something subjective and complicated. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid. Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno⁸⁰ line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.⁸¹ In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

IV. Federal Observers Are Needed to Prevent Voter Harassment

The appointment of federal examiners to register voters has been extremely important over the years. For example, from 1964 to 1967, the percentage of African Americans registered

⁸⁰ 509 U.S. 630 (1993).

⁸¹ See, e.g., Johnson v. Miller, 515 U.S. 900 (1995).

to vote in counties in Mississippi in which examiners were appointed increased from 8.1% to 70.9%.⁸² While the examiner provisions have been superseded by state and federal laws, such as the National Voter Registration Act of 1993 (NVRA), the observer provision of the Act remains important to ensure that minorities are not discriminated against or intimidated while voting.⁸³ Since 1966, a total of 25,000 non-partisan, impartial observers have supervised elections to ensure that minorities can exercise their fundamental right to vote. Congress should now renew the observer provision of the act to ensure that minorities continue to be protected from harassment at the polls.

V. Voting Assistance for Language Minorities Is Still Needed

The Voting Rights Act requires election officials in certain cities, counties, and states to provide assistance to those U.S. citizens who have difficulty speaking or reading English. Under Section 203 of the act, in those jurisdictions where language minority voters make up a significant portion of the population, U.S. citizens who are speakers of Spanish, Native American languages, Asian languages, and Alaska Natives can get help voting.

As anyone who has voted can attest, there are sometimes complicated issues on the ballot, which can be difficult to understand, even for native speakers of English. The Voting Rights Act promotes fairness at the ballot box because it allows U.S. citizens with disabilities or difficulty speaking English the opportunity to get help at the polls. Congress should renew the expiring provisions of the act so all Americans have equal access to the ballot box.

⁸² U.S. Commission on Civil Rights, Political Participation (Washington: U.S. Government Printing Office, 1968), 247.

⁸³ 42 U.S.C. § 1973f.

VI. Recovery of Expert Fees Should Be Allowed in Voting Rights Cases

While the Department of Justice has an important role to enforce the Voting Rights Act, the vast majority of voting rights law suits have been brought by private lawyers and civil rights groups. Unfortunately, the Supreme Court has ruled that winning parties in civil rights cases cannot recover expert witness fees as part of the costs they are entitled to receive.⁸⁴ This decision has had a chilling effect on voting rights litigation because it requires lawyers and non-profit organizations to front tens of thousands of dollars in expert witness fees that can never be recovered. It also greatly undermines the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. Litigating voting rights cases is particularly expensive because expert witnesses are needed to present demographic evidence, analyze and present statistical evidence of racial bloc voting, and testify about the "totality of circumstances" surrounding racial discrimination in the jurisdiction. For all these reasons, Congress should amend the attorney's fee provision of the Voting Rights Act to permit the recovery of expert fees and expenses.

⁸⁴ West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).